UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

State of Oklahoma, et al.,	)	
	)	05-CV-0329 GKF-SAJ
Plaintiffs,	)	
	)	
v.	)	**THE CARGILL DEFENDANTS' REPLY TO PLAINTIFFS' SUPPLEMENTAL BRIEFING FILED MAY 2, 2007 REGARDING THE CARGILL DEFENDANTS' MOTION TO COMPEL**
	)	
Tyson Foods, Inc., et al.,	)	
	)	
Defendants.	)	
	)	

At the April 27 hearing on the Cargill Defendants' Motion to Compel, a dispute arose regarding the relevant difference in this instance, if any, between document production under Federal Rules of Civil Procedure 33(d) and 34(b). The Court allowed Plaintiffs to provide supplemental authority on this point and for the Cargill Defendants to briefly respond. Contrary to Plaintiffs' assertions in their May 2 brief, neither the "Tyson rule" nor the fictitious "Cargill rule" frame the issue – it is the Federal Rules.

Before choosing a method of production, parties must undertake the threshold task of finding relevant information responsive to discovery requests. Once relevant and responsive information is located, under Rule 34(b), parties may opt to produce it either as kept in the usual course of business or as categorized and labeled to correspond to categories in the request. Similarly, under Rule 33(d), once relevant and responsive information is located, parties may opt to provide a narrative interrogatory answer or to produce specific business records. Both Rules 33(d) and 34(b) allow for responsive

information to be produced as kept in the usual course of business – not for an entity to produce a huge undifferentiated mix of unresponsive and responsive materials. Both Rules strongly discourage bankers box production methods like that of Plaintiffs, where volumes of non-responsive information was enmeshed with responsive documents, without even an accurate or helpful overall index. For example:

- Rule 34(b) is designed to prevent parties from "deliberately [] mix[ing] critical documents with others in hope of obscuring significance." Fed. R. Civ. P. 34(b) advisory committee note (1980);

- "[D]irecting the interrogating party to a mass of business records or [] offering to make all of their records available, justifying the response by the [business record] option . . . are an abuse of the option." Fed. R. Civ. P. 33(c) advisory committee note (1980); and

- "A respondent may not impose on an interrogating party a mass of records as to which research is feasible only for one familiar with the records." Fed. R. Civ. P. 33(c) advisory committee note (1970).

The Rules are intended to complement each other. See, e.g., Fed. R. Civ. P. 33 advisory committee note (2006) ("Rule 33(d) is amended to parallel Rule 34(a)" in its treatment of ESI); Fed. R. Civ. P. 34(b) advisory committee note (1970) ("The procedure provided ... is essentially the same as that in Rule 33 ... and the discussion in the note appended to that rule is relevant to Rule 34 as well."). As revealed by the above notes, 33(d) and 34(b) have base parallel purposes: to facilitate the fair production of responsive documents.

The major problem with Plaintiffs' document production under both Rules is their failure to abide by the primary obligation to produce information responsive to the Cargill Defendants' requests as kept as business records. The issue is whether Plaintiffs have adequately responded to the Cargill Defendants' unique discovery, not how many

requests have been served on Plaintiffs by the various defendants they chose to sue.[1] Any claimed issues Plaintiffs have with other defendants is beyond the scope of this motion.

In their Supplemental Authority, Plaintiffs invoke various cases from around the country to support their method of producing hundreds of undifferentiated boxes under Rule 34(b)'s ordinary course of business option. However, a recent decision distinguished two of Plaintiffs' cases in a situation similar to the case at hand. See Am. Int'l Specialty Lines Ins. Co. v. NWI-I, Inc., 240 F.R.D. 401, 410-11 (N.D. Ill. 2007) (distinguishing Hagemeyer N. Am., Inc. v. Gateway Data Scis. Corp., 222 F.R.D. 594, 598 (E.D. Wis. 2004), and In re Adelphia Commc'ns. Corp., 338 B.R. 546, 551-52 (Bankr. D.N.Y. 2005)). The American International court found that offering warehoused documents did not constitute production in the usual course of business, emphasizing that a key reason for allowing ordinary course production under Rule 34(b) "is to preclude artificial shifting of documents." Id. at 410 (citation omitted).

> A business has an obvious incentive to keep needed documents in a way that maximizes their usefulness in the day-to-day operations of the business. That incentive, which is inconsistent with document tampering, vanishes once documents not used with regularity are sent to a storage facility, for then it is no longer essential that they be kept with any degree of organization.

Id. (quotation omitted). The producing party can satisfy Rule 34(b) by demonstrating that

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[1] As relatedly described in the moving brief, last fall the Cargill Defendants reasonably requested that should Plaintiffs conduct multi-defendant on-site agency inspections, that Plaintiffs somehow delineate what responded to the Cargill Defendants' specific requests. Plaintiffs did not. (See Mot. Compel at 7, discussing Exs. 5 and 10: Docket No. 1054.)

the way in which the documents are stored is unchanged from how they were kept in the usual course of business. Id. (citation omitted). The American International court distinguished Hagemeyer because there, the boxes of documents were neatly stacked and clearly labeled. Id. at 411 (citing 222 F.R.D. at 598). The court likewise distinguished Adelphia, where the records at issue were separately archived. Id. (citing 338 B.R. at 551-52). Further, the court noted that the Adelphia court itself had held that per "Rule 34(b), any archived documents produced must be thoroughly indexed, the boxes accurately labeled and the depository kept in good order." Id. (quoting 338 B.R. at 551).

The present suit is much like American International, where some warehoused boxes were inaccurately labeled, many boxes either had no labels or labels that provided no indicia of the contents, and the producing party could not confirm the boxes' contents. See id. Under such circumstances, simply providing access to a master index and warehoused documents violates Rule 34(b). Id.; cf., T.N. Taube Corp. v. Marine Midland Mortgage Co., 136 F.R.D. 449, 456 (W.D.N.C. 1991) (noting improbability that party in the ordinary course "routinely haphazardly stores documents in a cardboard box").

As the Court recognized at the April 27 hearing, Plaintiffs have not produced documents as they were actually kept in the ordinary course. As also demonstrated at the hearing, Plaintiffs' charts were worse than useless because they were effectively misleading. While Plaintiffs had the option of producing relevant, responsive information as kept in the normal course, they did not do so. Rather, they created a confounding and misleading system, dumping massive amounts of irrelevant and relevant warehoused and

office documents that do not even purport to respond particularly to the Cargill Defendants' requests, exacerbated by an inaccurate set of charts. Under the Federal Rules, Plaintiffs must rectify the confusion they created by delineating what documents are responsive to what Cargill Defendant requests. See, e.g, Am. Int'l, 240 F.R.D. at 410-11; Adelphia, 338 B.R. at 551-52. Hence, the Cargill Defendants respectfully reiterate their request that the Court compel Plaintiffs to supplement their discovery responses consistent with the Motion to Compel.

Respectfully submitted,

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